**NOT FOR PUBLICATION**

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS**
**DIVISION OF ST. CROIX**
**APPELLATE DIVISION**

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| **ALAN MOTTA,** | ) | |
| | ) | **D.C. CRIM. APP. NO. 2002/163** |
| Appellant, | ) | |
| | ) | |
| **v.** | ) | T.C. CRIM. NO. 260/2001 |
| | ) | |
| **GOVERNMENT OF THE VIRGIN ISLANDS,** | ) | |
| | ) | |
| Appellee. | ) | |
| | ) | |
| _____ | ) | |

On Appeal from the Territorial Court of the Virgin Islands

**Considered: September 17, 2004**
**Filed: November 30,2004**

**BEFORE :** **RAYMOND L. FINCH**, Chief Judge, District Court of the Virgin Islands; **THOMAS K. MOORE**, Judge of the District Court of the Virgin Islands; and **IVE A. SWAN**, Judge of the Territorial Court, Sitting by Designation.

**Attorneys:**

**Renee Dowling, Esq.**
Attorney for Appellant

**Maureen Phelan, AAG**
Attorney for Appellee.

**MEMORANDUM OPINION**

**PER CURIAM.**

Following his conviction below, Alan Motta [“Motta”] filed a

motion for judgment of acquittal or, in the alternative, for new trial. That motion was denied, and it is from that denial that Motta appeals. Motta presents the following issues for review:

1) Whether there was insufficient evidence to support a finding of guilt for attempted rape in the first degree.
2) Whether it was error to deny appellant's motion for mistrial, where the victim collapsed in the presence of the jury;
3) Whether the court's jury instructions on the essential elements of the crimes constituted plain error.

For the reasons more fully outlined below, the trial court's determinations will be affirmed in all respects.

**I. STATEMENT OF FACTS AND PROCEDURAL POSTURE**

Kimberly Urgent ["Urgent"], a meter reader with the V.I. Water and Power Authority ["WAPA"], was reading meters in a brush area in Estate Mary's Fancy when two men approached her from behind. [Joint Appendix ("J.A.") at 253-54]. One of the men, whom she later described as the appellant, held a gun to her neck and led her back down the small incline. [J.A. at 264-65]. Urgent said Motta then ordered her at gunpoint to turn over her money and jewelry. [J.A. at 265]. She complied, removing the earrings, two rings and a watch she wore and turning them over to him. [*Id.*]. Motta's accomplice then searched the vehicle Urgent was driving as Motta continued to hold her at gunpoint. [J.A. at 268-69]. Finding nothing but a cellular phone, the other party

returned and suggested to Motta that Urgent "look[ed] sweet" and "let's have fun" with her. [J.A. at 269-73]. Following that statement, Motta, who continued to point the gun at Urgent, then ordered her to lay on the ground. [J.A. 273]. The second man then ripped Urgent's blouse and bra and unbuckled her pants. He attempted to remove her pants but, she testified, was unsuccessful because they were too fitted. He also ripped her panty. [J.A. at 277]. All the while, Motta continued to point the gun at Urgent. The two men fled the area after Urgent's cellular phone rang and she convinced them her supervisor would come to the area if she did not answer. [J.A. at 279].

Urgent described her perpetrators to police as two light-skinned, possibly Hispanic, individuals with long hair worn in braids. She said they both looked alike, except one appeared older and one was cross-eyed. Urgent later identified Motta and his brother from a police mug shot book.[1] [J.A. at 286]. She also later identified Motta when she went to a gas station he frequented and contacted police. [J.A. at 286-91].

Motta was arrested and charged with robbery in the first degree, attempted rape in the first degree and unauthorized possession of a firearm. Following a jury trial, he was convicted of those charges. This appeal followed.

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[1] His brother, David Motta, was charged separately.

## II. DISCUSSION

### A. Jurisdiction and Standards of Review

This Court has appellate jurisdiction to review judgments and orders of the Territorial Court in all criminal cases in which the defendant has been convicted, other than on a plea of guilty. *See* V.I. CODE ANN. tit. 4, § 33; Revised Organic Act § 23A.[2] We afford plenary review to the court's application of legal precepts; however, factual determinations may be reversed only if clearly erroneous.

To the extent the appellant's request for post-trial relief is based on insufficiency of the evidence, our review is plenary. *See Government of V.I. v. Sampson*, 94 F.Supp.2d 639, 643 (D.V.I. App. Div. 2000). We are not to weigh the evidence or the credibility of witnesses. Rather, we are to determine whether, viewing the evidence and all reasonable inferences therefrom in the light most favorable to the prosecution, a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Id.* The denial of a motion for a mistrial or for new trial is reviewed for abuse of discretion. *See Sampson*, 94 F. Supp. 2d at 643; *United States v. Xavier,* 2 F.3d 1281, 1285 (3d Cir. 1993).

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[2] *See* Revised Organic Act of 1954 § 23A, 48 U.S.C. § 1614, *reprinted in* V.I. CODE ANN., Historical Documents, Organic Acts, and U.S. Constitution at 159-60 (1995 & Supp. 2003) (preceding V.I. CODE ANN. tit. 1).

**B. Sufficiency of the Evidence**

Motta first argues his conviction for attempted rape in the first degree cannot stand because the government failed to prove he attempted to have sexual intercourse with the victim as defined in the applicable statute.

Motta was charged, *inter alia*, with attempted rape in the first degree under title 14, section 1701(3) and section 331 of the Virgin Islands Code. Under that statute, the crime of rape in the first degree is established where a perpetrator engages in "an act of sexual intercourse or sodomy with a person . . . when the person's resistance is prevented by fear of immediate and great bodily harm which the person has reasonable cause to believe will be inflicted upon the person." *See* 14 V.I.C. § 1701(3). "Sexual intercourse", as contemplated in the statute, is defined as "vaginal intercourse or any insertion, however, slight, of a hand, finger or object into the vagina, vulva, or labia." 14 V.I.C. § 1699(d); *see also* § 1704. Conviction for attempted rape in the first degree necessarily requires proof that Motta bore an intent to engage in sexual intercourse with the victim through the use of fear of immediate harm and undertook a direct but ineffectual act toward its consummation. *See* 14 V.I.C. § 331; *see also*,65 AM. JUR. 2d *Rape* § 19. Motta argues the alleged conduct did not evince an intent to rape under

the circumstances, nor represented an affirmative step toward completion of that crime. We disagree.

Under Virgin Islands law, one who unsuccessfully attempts to commit an offense is subject to criminal liability for such attempt. *See* 14 V.I.C. § 331. Though not defined in our statutes, the standard for determining attempt liability has been judicially defined to require proof that the perpetrator took a substantial step toward completion of the underlying crime. *See e.g., Government of V.I. v. Albert,* 18 V.I. 21, 24 (D.V.I. 1980); *see also, Parson v. Government* of V.I., 167 F. Supp.2d 857 (D.V.I. App. Div. 2001). Our courts have adopted the following two-prong test for determining whether a defendant's acts constituted a "substantial step" for the purpose of attempt liability: 1) the perpetrator bore an intent to do an act or bring about certain consequences which in law would amount to a crime; and 2) the perpetrator did an act in furtherance of that attempt which goes beyond mere preparation. *See Albert,* 18 V.I. at 24(quoting LaFave & Scott, Criminal Law § 59, at 423); *see also, Parson*, 167 F. Supp. 2d 857(citing *Cheatham v. Government of V.I.*, 1994 U.S.Dist. LEXIS 10248 (July 21, 1994 D.V.I. App. Div. 1994); Model Penal Code § 5.01(1)(c)(1985)).

Intent is a question of fact which may be inferred from the conduct of the parties under the circumstances; it can rarely be

proven through direct evidence. *See Government of V.I. v. Lake*, 362 F.2d 770 (3d Cir. 1966). However, the prosecution must adduce objective, unequivocal facts which permit a reasonable inference of criminal intent. *See United States v. Everett*,700 F.2d 900, 908-09 (3d Cir. 1983)(noting that attempt liability may not be based merely on one's thoughts, desires, or motives, through indirect evidence, without reference to any objective fact*).* To support such an inference, the defendant's "acts should be unique rather than so commonplace that they are engaged in by persons not in violation of the law." *Id*. (citations omitted); *United States v. Cruz-Jimenez*, 977 F.2d 95 (3d Cir. 1992).

Given these standards, it is clear that what constitutes a substantial step defies universal definition or demarcation. *See United States v. Earp,* 84 Fed.Appx. 228,232-34, 2004 WL 46617,*4-6 (3rd Cir. 2004). Rather, whether a defendant's conduct constitutes a substantial step toward commission of the underlying crime is a factual determination based on the circumstances of each case, the nature of the substantive offense, and the defendant's conduct. *See id.*(citing *United States v. Crowley*, 318 F.3d 401, 408 (2d Cir. 2003)("Determining whether particular conduct constitutes a substantial step is 'so dependent on the particular factual context of each case that, of necessity, there can be no litmus test to guide the reviewing

courts.'")(quoting *United States v. Manley*, 632 F.2d 978, 988 (2d Cir. 1980)).

We reject Motta's argument that the verbal exchanges between himself and his cohort, and their accompanying actions, were merely innocent expressions and did not unequivocally point to an attempt to rape Urgent. In support of that argument, Motta asserts that the statements following their unprofitable robbery, to the effect that the victim looked nice and that they should have some "fun" with her, were not imbued with criminal intent and, in fact, could have been innocently made by anyone without criminal meaning. Motta additionally argues that those statements and his acts did not clearly reflect an intent to rape where neither the victim's nor the perpetrators' clothing was removed and where there was no touching or groping of the victim's vagina:

> Supposing Defendant/Appellant and his accomplice were to have taken off the victim's clothing, looked at her, and driven away with her clothes. What if Defendant/Appellant and his accomplice were to have taken off the victim's clothes and photographed her or some other such innocuous act. None of these actions would rise to the "substantial step" necessary for the completion of the crime of rape in the first degree. Likewise, the Defendant/Appellant and his accomplice merely saying, "let's have some fun with her," and pulling on her blouse and pants[,] not coupled with any other overt act, such as unzipping one or the other's pants, exposing their genitalia or touching, reaching or groping the victim's vagina is not a "substantial step" in the completion of the crime of rape in the

> first degree. Conduct that may be construed as innocent or unequivocal, without more, cannot support a conviction for attempt.

[Br. of Appellant at 18]. Viewed in a vacuum or under different circumstances, the appellant's and his co-perpetrator's conduct and statements might carry little meaning. However, the hypothetical circumstances Motta presents simply are not present here. The evidence presented at trial was that the perpetrators followed their statement by forcing Urgent to lay on the ground at gunpoint. Thereafter, they ripped Urgent's blouse, bra and panty. Their attempts to remove her pants were unsuccessful, because the pants fit snugly to her body. The perpetrators' attempts to disrobe Urgent were also stopped short when her cellular phone rang and she convinced them that if she did not answer, her supervisor would go to the scene to look for her. Little innocence may be found in ripping the clothing from a woman and attempting to remove her pants while having her lay on the ground at gunpoint. Motta's and his accomplice's statements that the victim looked "sweet" and that they would "have fun" with her take on new meaning when viewed in the context of the preceding robbery and their accompanying conduct. The totality of the surrounding circumstances in this instance fully supported an inference that the perpetrators intended to rape the victim and took the requisite steps toward completion of that crime.

We also find untenable Motta's suggestion that some other overt act, "such as unzipping one or the other's pants, exposing their genitalia or touching, reaching or groping the victim's vagina" was required to establish a substantial step in the completion of the underlying crime. [Br. of Appellant at 18]. A "substantial step" does not require that the perpetrator completed all, save for the final step, of the underlying offense. *See e.g., Earp,* 84 Fed.Appx. at 232-34; see also *United States v. Rosa*, 11 F.3d 315, 337 (2d Cir. 1993); 74 C.J.S. *Rape* §§ 34-35(2002)(the overt act "need not be the last proximate act to the consummation of the offense attempted to be perpetrated, but must approach sufficiently near it to stand either as the first or some subsequent step in the direct movement towards commission of the offense"). Therefore, liability for attempted rape is not predicated on the defendant having touched the victim's sexual organs or removed clothing. Rather, the threshold inquiry is whether the conduct strongly corroborates the defendant's criminal purpose, advanced the criminal purpose charged, and provided some verification of the existence of that purpose. See *Earp,* 84 Fed.Appx. at 233; *see also*,74 C.J.S. §§ 34-35. Under similar facts where the accused did not succeed in removing the clothing of the victim or in moving beyond the most primary steps toward the commission of a rape, courts have had

little difficulty in upholding a finding of guilt where the acts reflected an undeniable intent to commit the offense. *See e.g., Siquina v. Commonwealth*, 508 S.E.2d 350,353-54 (Va.App. 1998)(noting that "evidence need not show that appellant touched his victim's sexual organs or removed her clothing to reasonably infer his specific intent to commit rape");[3] *State v. Jessen,* 986 P.2d 684, 685 (Or. App. 1999)(substantial step found where defendant asked his daughter to have sex with him on several occasions by offering her more freedom, notwithstanding absence of any touching or threats); *State v. Johnson,* 67 N.W.2d 639,642 (Minn. 1955)(noting that an attempted rape begins with the initial attack on the female, which need not necessarily involve a battery, and not with the act of penetration.); *State v. Swan*, 34 A.2d 734,735 (D.N.J. 1943)(same); *State v. Gonzales*, 783 P. 2d 1239, 1243 (1989)(noting no evidence of attempt to actually penetrate victim required to establish attempted rape); *Commonwealth v. Chance*, 458 A.2d 1371, 1374 (E.D.Pa. 1983)(rejecting appellant's argument that attempt not shown where

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[3] (citing *Ingram v. Commonwealth,* 192 Va. 794, 802-03, 66 S.E.2d 846, 850-51 (1951) (finding that the circumstantial evidence as to appellant's motive and method of attack was sufficient to infer an intent to commit rape, although defendant said nothing during the attack that indicated his purpose, removed none of the victim's clothing, and did not touch any private parts of the victim's body); a*ccord Hart v. Commonwealth,* 131 Va. 726, 751, 109 S.E. 582, 590 (1921)(finding that "[t]he mode of the attack and the manner in which the force was exerted, unaccompanied by any explanation or indication ... tending to show any other motive, was sufficient to warrant the jury in finding that the accused intended" to rape his victim)).

he did not remove either his or the victim's clothing – she was already partially nude – and where he never touched her private parts as a result of her persistent effort to fight him off and where appellant held victim at gunpoint; noting that whether a substantial step has been taken is to be determined from what the person has done toward the rape rather than on what remains to be done); *Commonwealth v. Pasley*, 743 A.2d 521(Pa. 1999)(substantial step found where the appellant threw the victim on his bed, straddled her, pushed up her shirt and bra to her neck, and attempted to unbutton her pants and left only after the victim scratched and punched him until he bled).

Motta's conduct, as outlined above, was sufficient evidence from which a jury could reasonably infer that when he and his co-perpetrator ordered the victim to the ground at gunpoint, partially ripped her clothing from her, and attempted to remove her pants, his criminal purpose was to rape her and his conduct in furtherance of that purpose. The trial court's determination in that regard will be affirmed.

**C. Effect of Victim's Collapse Before the Jury**

Appellant next argues the victim's collapse in the presence of the jury evoked the sympathies of the jury, warranting a mistrial. We disagree.

Whether an occurrence or outburst at trial warrants a

mistrial rests within the discretion of the trial court, and its determinations in that regard is reviewed for abuse of that discretion. *See Government v. Petersen,* 131 F. Supp. 2d 707 (D.V.I. App. Div. 2001)(citation omitted); *see also, Xavier*, 2 F. 3d at 1285-86 (3d Cir. 1993). The fact that a victim suffers a fainting episode or some other outburst in the presence of the jury does not automatically require a mistrial; such relief is required only where the court determines that the incident prejudiced a substantial right of the defendant. *See e.g.*, *Xavier*, 2 F.3d at 1285-86; 31 A.L.R.4th 229 (2004). The prejudicial impact of the incident is to be determined after consideration of the following factors: (1) whether the incident was pronounced and persistent, creating a likelihood it would mislead and prejudice the jury, (2) the strength of the other evidence, and (3) curative action taken by the district court. *Xavier*, 2 F.3d at 1285-86; *see also*, 31 A.L.R.4th 229; *Taylor v. State,* 690 A.2d 933,935 (Del. 1997). Ultimately, a motion for mistrial must be granted only where the trial court concludes the incident was of such magnitude that it precluded the jury's impartial consideration of the case, and where a curative instruction would be ineffective in curing such prejudice. *See*

*Xavier*, 2 F.3d at 1285; 31 A.L.R.4th 229.[4]

Urgent collapsed as she prepared to leave the witness stand after being excused. [J.A. at 291]. The court immediately ushered the jury out of the courtroom and proceeded with a planned lunch recess. Moreover, before resuming with the testimony after lunch, the court gave a curative instruction in which, at the defendant's urging, it identified Urgent's medical condition coupled with stress as the primary factor contributing to her fainting episode. [J.A. at 296-304]. The court also admonished the jury that it was not to permit the incident to weigh on its deliberations. [J.A. at 303-04]. Urgent returned to the stand and endured an uneventful cross-examination. [J.A. at 307].

The incident was very brief and occurred at the conclusion

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[4] *Compare, State v. Hathaway*, 269 S.W.2d 57 (Mo. 1954)(no prejudice to defendant where rape victim passed out in presence of jury as she left the witness stand in the presence of the jury; emotional response by a victim of such a crime is not surprising); *State v. Violett*, 111 N.W.2d 598(S.D. 1961)(holding that mistrial properly denied where widow of murder victim fainted as she was assisted from the witness stand, reasoning that the disturbance was not of a sufficient caliber to affect the jury's deliberations and consideration of the case), *overruled on other grounds by State v. Waff*, 373 N.W.2d 18(S.D. 1985); *Miller v. State,* 292 S.E.2d 102(Ga.App.1982)(holding no abuse of discretion in denying mistrial where rape victim fell to the floor during her testimony, where victim was able to continue with examination without further incident and court instructed her to notify the court if she did not feel well); *Walker v. State,* 652 P.2d 88 (Alaska 1982)(no mistrial required as result of witness fainting in aisle after testimony, where trial court excused the jury and cautioned the jurors at that time and during final instructions to disregard the incident); *King v. State*, 769 S.W.2d 407 (Ark. 1989)(motion for mistrial was properly denied in rape prosecution, notwithstanding victim's collapse in jury's presence after she testified, where there was no indication that incident had been deliberate and where court admonished jurors to disregard it).

of Urgent's direct examination. The jury was immediately taken from the courtroom. Moreover, the curative instruction gave a medical explanation for Urgent's fainting episode and made no direct connection between that incident and the defendant's probable guilt. The nature of the incident does not support a finding that the defendant suffered substantial prejudice as a result. We accordingly find no abuse of discretion.

**D. Jury Instruction**

Motta challenges the jury instructions on grounds: 1) there was an impermissible variance in the charging instrument and the court's instructions on the essential elements of the crimes, affecting his right to a fair trial; 2) the court's omission of the location of the crime in its instruction on the essential elements of the crime of unauthorized possession of a firearm constituted plain error; and 3)the trial court's instruction on the elements of robbery in the first degree failed to instruct the jury that the property must have been taken "from [Urgent's] person." Motta concedes he made no contemporaneous objection to the instructions as required in this circuit. Thus, our review of these instructions is limited to plain error. *See* FED. R. CRIM. P. 30(d), 52(b).

"Plain errors" are those that "undermine the fundamental fairness of the trial and contribute to a miscarriage of

justice." *Rosa v. Government of V.I.*, 307 F.Supp.2d 695, 699 (D.V.I. App. Div. 2004)(quoting *United States v. Young*, 470 U.S. 1, 16 (1985)). That standard is established where the error is obvious and affected the defendant's substantial rights. *Id.* As we stated in *Rosa*, the plain error standard should be sparingly applied and is an appropriate basis for reversal only to protect manifest injustice to the defendant's substantial rights and where required to protect the integrity of the judicial process. *Id.* at 700; *see also United States v. Olano*, 507 U.S. 725, 732 (1993)(noting that plain error requires a finding that there was: 1) error, 2) that it was obvious error, and 3) the error affected the defendant's substantial rights). Moreover, in reviewing challenges to jury instructions, we are cautioned not to view the instruction "in artificial isolation" but, rather, to consider the challenged instruction "in the context of the instructions as a whole and the trial record." *Estelle v. McGuire,* 502 U.S. 62, 72 (1991)(quoting *Cupp v. Naughten,* 414 U.S. 141, 147 (1973)). With these precepts in mind, we turn to the appellant's challenges.

**1. Impermissible Variance**

Motta argues first that the trial court's instruction to the jury permitting a finding of guilt if he was found to have "aided and abetted another" unfairly injected an uncharged element,

where the Information charged him with committing the crimes "while aided and abetted by another person." This, he contends, presents an impermissible variance warranting a new trial. This is a distinction without a difference and need not detain us long.

The aiding and abetting statute under which Motta was charged provides:

> (a) Whoever commits a crime or offense or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another person would be a crime or offense, is punishable as a principal.
>
> (c) Persons within this section shall be prosecuted and tried as principals, and no fact need be alleged in the information against them other than is required in the information against the principal.

14 V.I.C. § 11(a)-(c). As the trial court noted in denying appellant's motion for post-trial relief, the law makes no distinction between the primary actor and the aider/abettor. Rather, the statute regards those acting in concert to commit a crime as principals and hold them equally and independently liable for the crime. [*See* Ct's Mem. Op'n and Order at 5](citing 14 V.I.C. § 11; *United States v. Hodge*, 211 F.3d 74, 77(3d Cir. 2000); *United States v. Standefer*, 610 F.2d 1076, 1090 (3d Cir. 1979), *aff'd*, 447 U.S. 10, 15-20(1980)). Moreover, the statute

makes clear that an Information charging aider/abettor liability need not allege any more facts than that required in an Information charging a principal with the same crime, *see* 14 V.I.C. § 11, nor is the prosecution of one perpetrator dependent on that of the other(s). The whole premise of aider/abettor liability is to hold responsible those who shared criminal intent with the actor and who sought, in word or deed, to bring about the act. *See* 14 V.I.C. § 11. The law imposes no requirement that prosecutors parse all of the acts and words constituting the crime to determine the specific acts of each actor; so long as shared criminal intent and participation in accomplishing the crime is shown, each participant may be charged as if he himself did the acts.

In the case *sub judice*, the jury was properly instructed on aidor/abettor liability as follows:

> A person may violate the law even though he or she does not personally do each and every act constituting the crime if that person aided and abetted in the commission of the offense. Section 11, of Title 14 of the Virgin Islands Code provides that whoever commits a crime or offense or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. Before the defendant may be found guilty of aiding and abetting others in the commission of a crime, the government must prove beyond a reasonable doubt that the defendant:
>
> 1) Knew that the crime was to be committed or was being committed;
>
> 2) Knowingly did some act for the purpose of aiding, counseling, commanding, encouraging, or

> procuring the commission of that crime, and;
> 3) Acted, with the intention of causing the crime to be committed.
>
> Merely being present at the scene of the crime, or merely knowing that a crime is being committed, or is about to be committed, is not sufficient conduct for you to find that a defendant aided or abetted the commission of that crime. Rather, the government must prove that the defendant knowingly associated himself with the crime in some way as a participant – someone who wanted the crime to be committed – not as a mere spectator.

[J.A. at 828-29]. The jury was additionally instructed that to find the appellant guilty of Counts I and II, the government was required to prove that Motta bore a specific criminal intent and that the respective criminal act was committed by either Motta or another person acting in concert with him. [*Id*.] On the charge of robbery first degree, the court instructed the jury that it may find the defendant guilty only if it found, *inter alia*, "That during the alleged acts <u>the defendant or another perpetrator</u> of the crime displayed, used or threatened the use of a dangerous weapon." [J.A. at 830-32](emphasis added). Finally, for the crime of attempted rape in the first degree, the court instructed the jury on the proof required to sustain a conviction as follows:

> (1) That the defendant intended to perpetrate an act of sexual intercourse against Kimberly Urgent, or aided and abetted another person who had such intent;
> (2) Thereafter, that the <u>defendant, or another person whom he was aiding or abetting</u>, did an act constituting a substantial step toward the commission of that crime;
> 3) That Kimberly Urgent's resistance was prevented by

> fear of immediate and great bodily harm which she had reasonable cause to believe would be inflicted up on her;
> 4) That the defendant acted with specific intent, or aided and abetted another person who had such intent; and
> 5) That the act occurred on September 12, 2001, in the judicial district of St. Croix.

[J.A. at 833-34](emphasis added). These instructions fully apprised the jury that it could convict Motta if it found he intended that the crimes be committed and either primarily did the acts or aided another in accomplishing that purpose. Given the independent responsibility imposed on all perpetrators to a crime – whether they are the principal actor or not – we find the instruction did not inject additional elements not charged in the information. Accordingly, we affirm.

**2) Instruction on Elements of Offenses**

Motta argues the trial court committed reversible error in failing to charge the jury that the crime of unauthorized possession of a firearm must have been proven to have occurred in the judicial district of St. Croix. However, viewed in totality, the jury instructions informed the jury that the charged crimes must have occurred on St. Croix. That element was included throughout the instructions on the other offenses and during the court's reading of the Information both in *voir dire* and in the final instructions. Moreover, the testimony of all of the

witnesses established that all of the charged crimes occurred in Estate Mary's Fancy, St. Croix. [*See e.g.*, J.A. at 253-54, 351]. Given this evidence and the absence of any real dispute regarding the location of the crime, there is no basis for finding the jury instruction plainly erroneous.

Motta's claims of error based on the trial court's failure to instruct the jury that the proof of first degree robbery required a showing that the property was taken from Urgent's person must similarly be rejected.

One may be convicted of first degree robbery under Virgin Islands law, where it is shown that he or a co-perpetrator 1) caused physical injury to a person during the commission of the crime or during the immediate flight therefrom; or 2) displayed, used or threatened the use of a dangerous weapon. *See* 14 V.I.C. § 1862. Robbery is defined in the statute as the "unlawful taking of personal property in the possession of another, <u>from his person or immediate presence</u> and against his will, by means of force or fear." 14 V.I.C. § 1861 (emphasis added). Here, the court instructed the jury that it must find that Motta "took personal property from another" by force. [J.A. at 831-32]. The evidence at trial was that Motta demanded Urgent's money and the jewelry she was wearing, while holding her at gunpoint. Applying the precepts noted above, we find no reversible error.

**A T T E S T:**

**WILFREDO F. MORALES**
Clerk of the Court

By:_____
Deputy Clerk

**NOT FOR PUBLICATION**

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS**
**DIVISION OF ST. CROIX**
**APPELLATE DIVISION**

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**Attorneys:**

**Renee Dowling, Esq.**
Attorney for Appellant

**Maureen Phelan, AAG**
Attorney for Appellee.

**ORDER OF THE COURT**

**PER CURIAM.**

**AND NOW**, for the reasons more fully stated in a Memorandum

Opinion of even date, it is hereby

**ORDERED** that the appellant's conviction is **AFFIRMED.**

**SO ORDERED** this 30th day of November, 2004.

**A T T E S T:**
**WILFREDO F. MORALES**
Clerk of the Court

By:_____
Deputy Clerk